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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

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No. 8

ANN FRANCIS, PLAINTIFF IN ERROR

vs.

PETER J. FRANCIS, WILLIAM FRANCIS AND FRANK FRANCIS, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

SUPPLEMENTAL BRIEF OF CHESTER L. COLLINS FOR THE DEFENDANTS IN ERROR.

CHESTER L. COLLINS,
Attorney for Defendants in Error.

PRESS OF C. & J. GREGORY

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STATEMENT.

Briefs have been filed in this case as follows:

1. Main brief of plaintiff in error, hereinafter designated as Mr. Van Kleeck's brief.
2. My main brief.
3. Brief of General Duffield for plaintiff in error.
4. Brief of Mr. Crutchfield for plaintiff in error.

When my main brief was prepared, I had not seen the briefs of General Duffield and Mr. Crutchfield.

This brief it is intended shall be a reply more particularly to the points of the two last mentioned briefs, although

of course incidentally it will refer to the points in Mr. Van-Kleeck's brief. I have not considered it necessary to analyze or comment upon all the cases and authorities cited by opposing counsel, and wherein this has not been done, it is submitted that the authorities themselves upon examination will be found not to sustain the points to which they are cited, and not inconsistent with the positions contended for on the behalf of defendant in error. In so far as I have not undertaken to answer specifically points and authorities made by counsel, it is submitted that they are fully answered and covered by the arguments of my briefs.

I.

Under a proper interpretation of the treaty, a conveyance in fee simple of a present alienable title to the land in question, subject to identification and survey, was granted.

The land was granted.

The grant of the treaty was not limited to a grant of the use of the land.

Upon a consideration of the opposing briefs and the points therein made, a discussion under the foregoing propositions which negative contentions of these briefs seems proper.

United States vs. Choctaw, Etc., Nation, 179 U. S., 494-552. In this case this Court had occasion to consider the question of the construction of Indian treaties, and reference is made upon that point to pages 531-534, 538. And this Court, speaking by Mr. Justice Harlan upon that point, 532-533, among other things said: "But in no case has it been adjudged that the Courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the Court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That

would be an intrusion upon the domain committed by the Constitution to the political departments of the government."

* * "What was said in The Amiable Isabella, 6 Wheat., 1, *71, 72*, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the Court, said: "In the first place, this Court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. * * * In the next place, this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualifications or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal part of the treaty, equally give the rule to the judicial tribunals."

United States vs. Brooks, 10 How., 445-460. In this case the treaty of 1835 with the Caddo Indians was under consideration. Article 1 provided: "It is agreed, that the legal representatives of the said Francois Grappe, deceased, and his three sons, Jacques, Dominique and Balthazar Grappe, shall have their right to the said four leagues of land reserved for

them, and their heirs and assigns, forever." And this Court, in the opinion at page 460, says: "The reservation to the Grappes, 'Their heirs and assigns forever,' creates as absolute a fee as any subsequent act upon the part of the United States could make. Nothing further was contemplated by the treaty to perfect the title. Brooks being the alienee of the Grappes for the entire reservation, he may hold it against any claim of the United States, as his alienors would have done." This case is summarized in the opinion in Jones vs. Meehan. In connection with the citation, this Court, in Jones vs. Meehan, observe that the words "heirs and assigns" in a treaty are not necessary to create a grant in fee simple, but still it is most respectfully submitted that this Court, in U. S. vs. Brooks, decided that the words descriptive of the grant shall have "*their right. * * * reserved for them and their heirs and assigns forever,* characterized the grant and indicated that it was the intention of the parties that the grant should be of a fee simple estate.

As pertinent to the foregoing and subsequent discussion, an analysis of the conditions at the time of making the treaty is material. These conditions were, first, the government owning the fee of the land; second, the Chippewa nation owning the use of the land; third, the children of Bo-kow-ton-den, beneficiaries who were not parties to the grant, but simply the object of the bounty of both the government and the nation.

It is the law (175 U. S., 32), that the government could not modify or change the treaty without the consent of the Indians. It is law that the Chippewa nation could not change the treaty without the consent of the government. It follows then that the only way that the treaty could be changed or modified would be by a subsequent treaty made with all the solemnity and with all the binding force that treaties are made. There is no evidence of any subsequent treaty in any manner modifying or changing the above treaty.

These other circumstances are also to be considered in connection with the execution of the treaty. The United States was represented among and with the Chippewa nation

by an Indian agent, the agent being the representative of the bureau or office of Indian Affairs among the Indians, and upon the other hand there was the Chippewa nation of Indians, with its chiefs and head men, and laws and customs, and with its rules in regard to the minor children. The evidence does not show what the ages of Bo-kow-ton-den's children were at the time of making the treaty. They must have then been living, or a treaty made to the children of Bo-kow-ton-den on this point would be a farce. It is not unreasonable to suppose that the question of the minority of these children was considered if they were minors, and that it was considered that their interests would be looked after either by the Indian agents or the chiefs of the nation. It is not contended that provision could not be made notwithstanding the treaty, bearing upon and affecting the person of the reservees to protect them during their minority. But it is contended that this is the limit to which either the government or the Chippewa nation could go in this respect, and then the action would be based, not upon rights given by the treaty; not because the reservees were the grantees in the treaty, but because of the minority of the grantees, because of their protection until they should become adults; but the burden of proof is upon the plaintiff to show that such provisions were made, if they ever were made, and nothing has been shown in this regard.

The title granted under the terms of the treaty was the highest title known to the law, a fee simple title, and it must be assumed that it was presumed at the time of making the treaty to be for the benefit of the beneficiaries—to give them the highest title known to the law. If the government owning the fee simple title should at any time on its own motion have undertaken to modify or change the contract, or to place any limitation upon the conveyance by the grantees, this action of the government would be in impeachment of the title already granted by it, and in view of the grant would take away from the grantee something which before that had been given by it. The same would be true of the Chippewa nation in any action which it would take in the matter. Good faith

to the Indians requires that the treaty as made should stand as made. This treaty should not be changed, because upon a consideration of the circumstances at the time of the commencement of this case, more than seventy-five years after the treaty, it now appears that alleged descendants of the children of Bo-kow-ton-den would be benefited if the title of their ancestors could be now impeached and be made subject to conditions and limitations that were not made and contained in the grant upon which their title is based. Every case and statute cited and every argument made in the opposing briefs to prove and sustain the point that good faith should be exercised in dealing with the Indians, I submit, favors sustaining the grant to the children of Bo-kow-ton-den as contained in the treaty, to the effect that the grant was a fee simple, present, alienable title.

Referring to the claim in General Duffield's brief, pages 4 and 5, to the effect that the grant to Moosedung, ruled on in Jones vs. Meehan, should be distinguished from the grant to Bo-kow-ton-den because it was a special subject of discussion in the negotiation of the treaty, and that he claimed it distinctly as a consideration for his signing the treaty, I most respectfully urge that this consideration is not entitled to any weight. It is a matter of history that in the negotiation of the treaties, the individual grants to the individual members were a part of the consideration of their execution; but this consideration and point was as strong in the matter of the grant to the children of Bo-kow-ton-den as in the matter of the grant to Moosedung.

It is true that in the opinion of Mr. Justice Gray it appears that on the hearing which was in chancery, certified copies of extracts from the proceedings in the journal of the treaty were put in evidence under objection, and upon the subject of this testimony the opinion on pages 23-24 reads as follows: "Such being in our opinion the construction and effect of the terms of the treaty itself, it is unnecessary to consider the competency of the extrinsic evidence offered by the plaintiff of what took

place between the representatives of the parties at the negotiations which preceded its execution, for whether that evidence be admiteed or rejected, the conclusion must be the same."

General Duffield, on pages 4-9 of his brief, as well as do counsel in their original brief, pages 5-8, contends in effect that the grant to Bo-kow-ton-den's children conveyed successive life estates to the heirs. Reference to this point has been made in my main brief, pages 40-42, but it will be further noticed. This argument proceeds upon the assumption that the Indians and their representatives understood that each of the reservees mentioned in the third article of the treaty got successive, unalienable life estates; that the Indians must have understood that this reservation gave them the use of the land for the lives of these children and their heirs successively, with power to hold, but without power to sell. It is submitted that the Indians did not have such understanding, or that they could even imagine such a kind of an estate as that. They could understand what it meant to have land which belonged to them as their own for all purposes, and that was what the Indians bargained for on behalf of the reservees in the third article, and that is what they got. In the Moosedung case, the words "of inheritance" were not used, but the grant was construed as a fee simple grant, and this construction was arrived at from a consideration of the whole treaty, and for this reason considering the words "of inheritance" used, the Bo-kow-ton-den case, is a stronger case in favor of the grant to the reservee than the Moosedung case is. But the representatives of the government knew the force and effect of the words "of inheritance" as applied to the reservees named. In order that there might not be any ambiguity, the words "of inheritance" were added to the other words of the grant in order to carry out the agreement of the parties that the grant was to be a fee simple grant of an alienable title.

And upon this point reference is also made to page 8 of General Duffields's brief where, in support of his contention as

to article two, in which it is stated that from the cession aforesaid the following tracts of land shall be reserved for the use of the Chippewa nation of Indians, and it is submitted that there is no force in the contention of counsel based on a comparison of the two articles, the distinction between the two being plain. The authorities cited in my main brief show that a reservation in a treaty to certain members of an Indian tribe is equivalent to an absolute grant, and the title is given by the treaty, but the reservation to the nation as a nation which makes the treaty, simply excepts the land reserved from the granting clause of the treaty, or as applied to this case, the land described in article two was excepted from the cession of article one. In the case of the individual there is a grant in fee simple; in the case of the nation there is an exception to the cession.

In opposing briefs are criticisms of the authorities cited in my main brief, and to some of these criticisms attention will be given. On page 23 of my brief is set forth opinion No. 63 of opinions of the Attorney General on file in the General Land Office. This opinion and all there is about it is correctly set forth in my brief, page 23. The note by the solicitor of the General Land Office cited there is a foot note at the bottom of the page, and is not a part of the opinion, as it would seem to be as set out in the opposing brief. My description (on page 22 of my brief) of the work from which the extract was taken, is not accurate, and I hereby correct such reference. The full title of the second volume of the work from which the opinion is taken, and in which it is found on pages 96 and 97, is as follows: "Public Lands, Acts, Instructions and Opinions—Instructions and Opinions, 1796-1838." The Senate resolution authorizing its publication was passed in 1837. It was published as stated in my main brief in 1838. The work was prepared by Matthew Birchard, then solicitor of the General Land Office, and on page four of the preface, it is stated that volume two contains all of the opinions of the Attorney General on file in the General Land Of-

fice, numbered from 1 to 152, inclusive. The opinion in question then is No. 63 on file in the General Land Office at the time the publication was prepared.

In Mr. Crutchfield's brief this is called an anonymous opinion. As to this point it is to be noted that its authenticity rests upon the word and record of Lewis Cass, then Secretary of War. It is on file as a part of the records of the General Land Office, presumably for information to those drafting and construing Indian treaties and dealing in lands derived through Indian treaties. Lewis Cass was the commissioner who signed the Saginaw treaty on behalf of the United States, and I submit that at the time it was rendered, it represented the opinion of the law department of the United States, of Lewis Cass, who was then Secretary of War, and that the principles of the opinion were in harmony with the practice as to prior and subsequent treaties. By reference to the Senate Journal of the first session of the 24th congress, at page 196, in the proceedings of March 3, 1836, it will appear that the Senate proceeded to consider the report of the committee on Indian Affairs on the petition of Non-de-sha-mu, alias Peter W. Knaggs, and in concurrence therewith, resolved that the committee be discharged from further consideration of the petition. The Senate of the United States at that time, with the concurrence of the President, was the treaty-making power as to all treaties made by the Indians. Upon this branch of the case it was the government. This opinion of the Attorney General and this action of the Senate, so far as known, has never been questioned until and except in this case.

The case in 1st Douglas is the leading Michigan case on the Saginaw treaty, and in it consideration was given to the views set forth in these documents. And the opinion in the 1st Douglas has never been questioned until in this case.

I cannot agree with the opinion of counsel to the effect that the petition of Non-de-sha-mu is of greater force than the action of the Senate upon this question. It does not appear *how* Non-de-sha-mu *was made to think* what he did when

his petition was signed, nor what he did think when the treaty was made, neither does it appear that either of these points are material. The parties to the treaty were the government and the Chippewa nation of Indians, and Non-de-sha-mu, although a beneficiary under the treaty, was not a party to it.

The Michigan cases cited in my main brief are criticised by all of the opposing counsel from various points of view. It is contended among other things that a decision of the questions decided by them was not necessary in deciding the cases before the Court. Upon this point I must take issue with counsel, and upon this question the cases themselves will sustain my contention.

The case in Walker's chancery is not specifically criticised. In respect to the case in 1st Douglas, both in General Duffield's brief and in Mr. Crutchfield's brief, much is made of the fact that in 1st Douglas, on page 546, it was said: "It is very clear that if the fee simple title were intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention." This is a criticism of the verbiage used, but it does not affect the result, because the Courts follow by saying that *it is difficult to conceive that by the language used any other estate was in the contemplation of the parties at the time of its execution.* The only effect of the criticism of counsel so far as can be seen is to show that at the time of the treaty the parties representing the government had not the skill and learning imputed to this class of persons in citations made in Mr. Crutchfield's brief.

In respect to Dewey vs. Campau, 4 Mich., 565, counsel make this statement: "This case practically went by default, there being no appearance whatever for the plaintiff in error." Counsel unintentionally creates a wrong impression. As shown by the opinion there were two points involved in the case; *first*, the effect of a certified copy of a map from the General Land Office on which a certain section was designated as a tract of one of the reservees, the *determination of which point also involved a consideration of the treaty. Second*, a

question respecting the acknowledgment of a deed under the revised statutes of 1838. The plaintiff was not represented in the Supreme Court of Michigan and the defendant was. The case was reversed and a new trial granted, but in the opinion the point first above made, being the point upon which this case is claimed as an authority, and being the point in respect to which the extract from the opinion is quoted, was ruled in favor of the plaintiff, notwithstanding he did not appear in the case. Even if the plaintiff did make default, the decision under which we claim was a decision made in his favor. The case was reserved to the Supreme Court from the Genesee Circuit Court which required the Court to consider and pass upon the questions reserved, which it did with the effect as stated.

In Campau vs. Dewey, 9 Mich., 432, Judge Christiancy, speaking for the Court, said, in respect to Stockton vs. Williams, supra: "This decision has for 16 years been recognized as the law governing titles under the treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the face of this decision. We are therefore compelled to recognize it as a rule of property which we are not at liberty to disturb."

When Judge Christiancy said this, he was speaking about the decision in Stockton vs. Williams, and about the effect of that decision, and there can be no doubt that he said what he meant and meant what he said. The fact that at the time of making this statement he was discussing a question of evidence instead of discussing the property point decided, does not change the situation or affect the weight of his statement. The reading of the whole case will prove my contention, but an extract from the opinion at page 434, it is submitted, is conclusive upon the question. The learned justice said: "It is insisted that the Act of Congress of June 15, 1844 (6 U. S. Stat. at Large, 913), authorizing a patent for the land to Joseph Campau, the patent itself, and the affidavits filed under the act, ought to have been admitted, as tending to show by hearsay or reputation, that Madame Coutant bore the name

of Tawcumegoqua. It was not claimed on the argument that the act or the patent could directly affect the rights of the parties, as a law or a patent; and they certainly could not, as the title passed by the treaty, and was beyond the control of Federal legislation. All questions affecting the title were judicial questions only. The act and all proceedings under it were *res inter alios*, and the proofs taken under it were not only *ex parte*, but extra judicial; and we can discover no ground on which the act, the proofs taken under it, or the patent, could be received as the mere declarations of third persons; they were no part of the *res gestae*, and were made long after the event upon which alone they could operate, if not also *post litem motam*."

Attention is called to the statement in the foregoing extract as follows: *It was not claimed on the argument that the act or the patent could directly affect the rights of the parties, as a law or a patent; and they certainly could not, as the title passed by the treaty, and was beyond the control of Federal legislation.*

None of the adverse criticism of counsel can remove the condition that the effect of their claim that the words "for the use of the persons," etc., passed only a title to the use and not a title to the land, affects and governs all of the titles granted by article three of the Saginaw treaty to the beneficiaries therein named, and all successive titles to said land down to and including the present time. Neither can the adverse criticism of counsel upon the Michigan cases change the condition that under the repeated decisions of the Supreme Court of Michigan, five separate decisions, commencing in 1840 and terminating in 1903, it has been the law of Michigan that the grantees in the third paragraph of the Saginaw treaty received a present, alienable fee simple title by the grant, and that all who have dealt in the land governed by the said title have doubtless dealt in reliance upon the law as laid down. Neither can it be denied that the opinion of the Attorney General and of the Senate above referred to, which are a part of the public records of the country, were not to the same effect, and that

all dealing in land derived from the reservees of said section of said treaty can be assumed to have acted in reliance thereon, and it is submitted that the decisions of this Court from the 6th Wallace quoted in my main brief at pages 29-30, and from the 18th Wallace quoted in my brief at pages 30-31, are in letter and in spirit applicable to the situation as to the title under litigation in this case.

The case of Wheeler vs. Neshingonesia, 130 Indiana, 402, is cited in Mr. Van Kleeck's brief, page 6, and Gen. Duffield's brief, page 6. This case is not in point because the reservation under discussion was for a *band* of Indians, and it therefore stood in respect to the questions of law applicable to it the same as the reservation in article 2 of the treaty of Saginaw.

Cases are cited in opposing briefs from this Court and from the Supreme Court of Kansas construing treaties and treaty rights, the most of which are cases commented upon in the opinion in Jones vs. Meehan. These cases are not relevant or applicable to this case, for the following, among other reasons:

1. No law of Congress has been pointed out which affects the title or tenure of the heirs of the children of Bo-kow-ton-den.

2. A law of Congress which, acting upon the grantees under a patent, and which created a limitation on the right of the grantee to convey the title acquired by the treaty, the right being for a limited time only and applying to the person of the holders of the title, would not be inconsistent with the contention of the defendants, and would not affect the tenure or quality of the title, therefore a decision of this Court sustaining such a law would not affect the decision of the Supreme Court of Michigan in this case.

3. A law making a five year limitation on the power of an infant Indian to convey its real estate would not turn the fee simple title conveyed by treaty into a title of another kind.

In such case the infant by arriving at age would outgrow the limitation.

4. Neither would any limitation created by a staute on the power of a person to convey, which limitation the person could, by becoming naturalized or by some other act on his part, remove, turn a title which would otherwise be a fee simple title into a title of a different kind, or affect the decision of the Supreme Court of Michigan in this case.

5. But a title which otherwise would be a title in fee simple, but to which was added, "But never to be conveyed by them or their heirs without the consent and permission of the President of the United States," by the addition of this limitation, would be changed from its fee simple quality, and there is no power in Congress to pass a law that would authorize such a limitation on a title before that granted.

II.

No act of Congress or law in force affecting or operating either on the land or the reservee, either expressly or by implication, permitted or created any limitation on the title to the grant by the treaty.

The act of 1802 did not have this effect.

No act of Congress or law in force at the time the treaty was executed or afterwards, acted as a limitation upon the power of an Indian to sell land the title to which was derived by him from the government of the United States, either by treaty or patent.

The act of 1802, Sec. 12, reads as follows: "No purchase, grant, lease or other conveyance of the land or of any title or claim thereto from any Indian or nation or tribe of Indians within the bounds of the United States, shall have any validity in law or equity unless the same be made by treaty or conveyance entered into pursuant to the constitution."

It is contended that so far as an individual Indian is concerned, the only operation this act could have upon him would be to render void any conveyance he might make to the land

which had not before that been granted to the United States; that the object and purpose of the act as a whole was to prevent a conveyance of the original right of Indians to land to any grantee, except the government of the United States, but that it was not the intention of the act to prevent Indians buying and selling land and buying and selling land again, or dealing or trafficking in lands to which the United States had by treaty or patent acquired the Indian right or title. This proposition, it is submitted, is in harmony with and is deducible from the history of the dealings between the colonies during colonial times and the United States up to and long after the time in question.

Able and energetic counsel have not been able to produce a single case in which the act of 1802, which was in force from 1802 until 1834, was cited as an authority against the conveyance by an Indian of land acquired by him under government title, and I submit that no such case from any Court of last resort of any state or from this Court can be found.

The treaty with the Potawatomies of 1831, signed on the 27th day of October, 1832, and proclaimed on the 21st day of January, 1833, in the third article granted "To Petchi-co, two sections," * * "For Francis Besion, one-half section." This treaty, it will be observed, was both executed and proclaimed prior to the act of 1834. There was no limitation in this treaty upon conveyance. There was no clause in the treaty providing for such limitation as in many treaties.

In this respect it was similar to the Saginaw treaty. In fact, upon the point in discussion it was the same. If, then, the position of counsel in respect to the Saginaw treaty is correct, the act of 1802 operated upon that treaty, and the grantees named therein, to enforce the limitation contended for in the opposing briefs. That treaty has been the subject of two decisions of this Court, both of which are summarized in the opinion in Jones vs. Meehan, and both of which are extensively quoted in my main brief, from the opinion in the last mentioned case. But bearing solely upon the question now

under discussion, reference is also made to both of these decisions.

Doe vs. Wilson, 23 How., 463, 464. The treaty was signed as above stated in October, 1832; it was proclaimed in January, 1833, and in February, 1833, Pet-chi-co conveyed the land referred to in the treaty to Cogullard and Colrick by a general warranty deed. Before the lands were selected or located by the President and before any patent issued, Pet-chi-co died. In January, 1837, patents were issued to Pet-chi-co and his heirs for the two sections mentioned in the treaty. In 1854 certain persons obtained a deed from the heirs of Pet-chi-co, under which deed the plaintiffs in the case below (who are the plaintiffs in error in this Court), claimed that the deed from Pet-chi-co in 1833 was invalid. Wilson claimed under the latter deed. The leading question in the case was therefore whether Pet-chi-co had a right to make the deed when it was made. If the contention of opposing counsel is correct, the Supreme Court should have ruled that the sale and conveyance made by Pet-chi-co to Cogullard and Colrick were void, because prohibited by the act of 1802, and that the title of the heirs of Pet-chi-co was therefore good, but on the contrary the Circuit Court and this Court ruled the other way. And upon the point under discussion, this Court, speaking by Mr. Justice Catron, said:

"The only question presented by the record that we feel ourselves called on to decide is whether Pet-chi-co's deed of Feb., 1833, vested his title in Coquillard and Colerick."

"Although the government alone can purchase lands from an Indian nation, it does not follow, that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property and alienable unless the treaty had prohibited its sale. Comet vs. Winton, 2 Yerger, 148; Blain vs. Johnson, Pathkiller's lessee, 2 Yerger, 414. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forth-

with to be surveyed and sold and inhabited by a white population among whom the Indians could not remain."

Crewes vs. Burcham, 1 Black, 352-358. The controversy in this case was over the grant to Frank Besion, in the same treaty. His half section was surveyed, selected, and the patent for it was duly issued in the name of Besion in 1845. Besion died in 1843. Previous to his death and, of course, before the patent, he conveyed his interest in the half section of land to which he was entitled to William Armstrong, with covenants of warranty and further assurances. After Besion's death and after the patent was issued, his sister and sole heir conveyed the half section to Crewes and Sherman. The plaintiffs in the Circuit Court claimed under the deed from Besion to Armstrong. The defendants in the Circuit Court held under the title which was conveyed by Besion's heir after his death. The latter parties commenced actions at law against persons claiming through the former, and the bill in this case was filed by the plaintiffs to quiet the title. The main question was whether Besion, before the day of the patent, had by virtue of the treaty, such a title as he could convey by deed, or whether the deed to Armstrong was void for want of an assignable interest in the grantor.

The Circuit Court found in favor of the complainant, and the decree of the Circuit Court was affirmed by this Court. This was a case for the application of the law of 1802 if it was applicable. If it had any application and was in force as contended for by the claimant, then the complainants were not entitled to any relief, because they were claiming under a void title. Among other points decided by the Court was this: On page 358, it was said that a further objection was taken that the defendants are *bona fide* purchasers for a valuable consideration. "But the answer is, that the deed from Besion to Armstrong, which referred specially to this reserved right to the half section, was duly recorded before the purchase of the defendants."

If the contention of opposing counsel is correct, the above deed was void as being restricted by the act of 1802, and would therefore not be notice to any person.

Best vs. Polk, 18 Wallace, 112-120. This case is cited, summarized and approved in the opinion in Jones vs. Meehan, and is also cited and referred to in my main brief. Attention however, is called to the circumstances which it is deemed are specially applicable to the point under present discussion. One Polk claiming the land in a controversy under title derived from a government patent issued to one Brown, brought suit in ejectment against Best. Best set up that prior to the issuing of the patent to Brown, the section had been located to an Indian named Ba-o-na-tu-be of the Chickasaw nation under the terms of the second treaty, and that he held under said Indian. This then was the issue tried in the Circuit Court, and was the basis of the questions decided in this Court. If the statute of 1802 had the construction placed upon it by opposing counsel, Best's title would have failed because Ba-o-na-tu-be was prohibited by that law from conveying to Best. Best succeeded in the case. In the opinion neither the law of 1802 or the law of 1834 was referred to. It is stated by counsel that the treaty was approved the same day that the law went into effect. If either law had been applicable some note of them would have been made in the opinion deciding the case.

The reason apparent from a reading of the law, it is submitted, shows the position by me herein contended for to be correct, and the incorrectness of the claims in the opposing briefs. Summarizing the statute, no purchase or other conveyance, etc., shall be of any validity in the law or equity unless same be made by treaty or conveyance entered into pursuant to the constitution. This means then if the statute is applicable to an individual Indian holding a title derived from the government, that prior to 1834 no Indian was permitted to sell any land by him acquired, no matter how he acquired it, without the formalities of a permission having been granted to him by and through a treaty signed by himself and someone rep-

resenting the government of the United States, signed by the President and approved by the Senate of the United States. A statement of this conclusion demonstrates that it was never intended that this provision should apply to sales by Indians of lands held by them under title derived from the government. It is no answer to say that the consent to the sale might be given in some other manner than that pointed out by the statute. The statute is imperative in its provision that the sale should be void unless the same be made by treaty or convention entered into pursuant to the constitution.

The *opinion of Attorney General Taney* of date September 20, 1833, is commented upon in the opinion in Jones vs. Meehan, and a proposition is quoted therefrom on page 12 of the Court's opinion. As to the point thus quoted, as pointed out in that opinion the Attorney General's opinion was overruled in Doe vs. Wilson, 23 How. 457, and Crewes vs. Bircham, 1 Black, 352, but upon the point under present discussion that opinion may be further examined.

The closing paragraph of the opinion reads: "The character of the title to these portions could not be affected by a grant which did not embrace them, and from the operation of which they are in express terms excepted; and as they are still held under the original Indian title, the Indian occupants cannot convey them to individuals, and no valid cession can be made of their interest but to the United States." It is respectfully submitted that it inferentially but clearly appears from this opinion that the Attorney General then understood that it was the law that the original Indian title could not be conveyed to any grantee other than the United States, but as to real estate acquired by an Indian by a title derived from the United States there was no legal bar to such conveyance.

III.

The Act of March 30th, 1802, section 12; the Act of June 30, 1834, section 12; R. S. of 1873, sections 2116, 5590 and 5597.

Some attention has heretofore been given to the Act of 1802, but an analysis will be made of the above statutes and a statement made of my claim in respect to them, and also a statement made upon the result of the same upon various theories.

1. The Act of 1802 did not operate upon the grant to the children of Bo-kow-ton-den in the treaty of Saginaw, because it was never intended to work limitations upon a grant by treaty such as the treaty of Saginaw.

2. The Act of 1802 was not a limitation upon the grant to the children of Bo-kow-ton-den by the treaty of Saginaw, because the treaty was complete and by its terms made an absolute grant without limit in any way upon the person or title of the grantee.

This being so, if there is a conflict between the treaty and the law, the treaty being of equal dignity, with the law, in case there is a conflict, effect is to be given to the treaty as the last expression of the law-making power, and in-so-far as there is a conflict, the treaty of Saginaw supercedes the law of 1802; in other words, the treaty of Saginaw is the law which governs in any conflict between it and the law of 1802.

Ample support is found for the legal propositions involved in this statement in A. & E. Encyclopedia (2d ed.), Vol. 28, page 480, and cases cited in note 9.

3. It follows from either of the above propositions, and both of them were true, that the reservees—Bo-kow-ton-den's children and their heirs—acquired a title under the treaty without limitation and in no wise controlled by the Act of 1802.

4. The reservation in the patent was not authorized or warranted by the law of 1802 or by any other law on the statute books at the time when the treaty was made, and is therefore void. The reasons for this position are elsewhere shown in my briefs.

5. The law of 1802 was superceded and repealed by the law of 1834. No argument will be made on this point. The

well-settled elementary rules of statutory construction demonstrates the correctness of this position.

6. Conceding for the sake of the argument what is not conceded, that the law of 1802 was in effect and in and of itself operated as a limitation upon sales between its date and the date of the law of 1834; then it could affect acts between those dates only, and could not be applied to and did not have any effect upon sales by Indians after that date. And did not affect the competency of Indians to make sales and conveyances of land after that date.

7. It is conceded, (Mr. Crutchfield's brief, page 10), that R. S. section 5596 expressly repealed the act of 1802; but the claim in that brief that R. S. section 5597 by its saving clause continues its effect as to acts done prior to 1873, is denied, and it is contended that this last section is not applicable to and has no effect upon the admitted repealed act of 1802.

8. Assuming that the law of 1802 was a bar or limitation upon sale made while it was in force, then, when by virtue of any subsequent law that law became in fact repealed, and the bar or limitation by it created became removed, and from such time the children or heirs of the children of Bo-kow-ton-den were without restriction as to their power of sale, and from that time whenever it came, whether by the repealed law in 1834 or in 1873, the children or heirs of Bo-kow-ton-den became subject to the doctrine of laches and their title subject to adverse possession.

Argument has elsewhere been made on some of the above points, but attention will now be given to those embraced in paragraphs 6, 7 and 8 of above. This will require an analysis of the act of 1802, section 12, in so far as it is assumed to maintain the contention that it expressed the right to protection against improvident alienation, and that the tenure of individual Indians under treaties negotiated prior to June 30, 1834, was fixed or limited by the act of 1802, and could not be changed without the consent of both parties, the Indian holder and the government, or by treaty with the Indian tribe. This

it is contended, is a right accruing or accrued, described and mentioned in section 5597 *supra*.

It is most respectfully submitted that the contentions of the plaintiff in error upon the point indicated are absolutely wrong in every particular, and are absolutely and wholly unwarranted by the statute, and having in mind these particular propositions, a further examination of the statute is made.

Eliminating all other considerations, the statute on the point in question is to the effect that no purchase or conveyance of lands or any title or claim thereto from any Indian shall be of any validity in law or equity unless made by *treaty or convention* entered into pursuant to the constitution. To what did this refer in point of time? It could not refer to any act done prior to the enactment of the statute. There is nothing in the wording of the statute which undertook to embody or have any effect upon any act done at any time after the act itself would become repealed or superseded. It undertakes only to prohibit a sale or conveyance unless made in a certain way. It purports to act upon the *parties* in the doing of certain acts. It does not purport to affect the *tenure* of the individual Indian, because it prohibits anything upon which a tenure could be based unless made in a certain way. It does not purport to protect against improvident alienation, because nothing is either expressed or implied in the act upon the question of protection against improvident alienation. There is nothing in the act either expressed or implied upon the subject of limiting titles, because it prohibits the giving of titles except by treaty. Upon this point the act expressly *acted* upon the *person* and expressly excluded the idea of imposing any limitation on the land or title. The right, in whatever shape it may be claimed, was not one which attached to the land or could be said to run with the land, in which event it could not be of any force or effect after the act was superseded or repealed. This view of the act which it is submitted is correct, reviews the claims of opposing counsel and sustains the propositions in paragraphs 6, 7 and 8 above.

And whenever the act of 1802 was repealed, all restriction upon the action of individual Indians was removed, and from and after that time they had the same power to deal with the lands as if the act of 1802 had never been passed.

IV.

The question of title by prescription based on adverse possession is not before this Court in this case.

The decision of the Supreme Court of Michigan that the plaintiff, being the heir of the children of Bo-kose-ton-den, and having a right to convey, a title by prescription can be gained, and the occupancy of the defendants has ripened into such title, is not a federal question, insofar as it relates to the occupancy of the defendant.

That the occupancy of the defendants and their immediate grantor by deed of the land has been continued so long that if at any time prior to the commencement of that occupancy the defendants or any heirs of Bo-kose-ton-den had the right to convey, then this decision of the Supreme Court of Michigan is binding and conclusive as against the plaintiff in this action.

The above contentions are made necessary by reason of claims made by opposing counsel, which will be hereinafter specifically referred to, on the facts as they appear in the record, the manner of the trial of the case in the Court below; the decision of the Supreme Court and the claims of counsel under the statutes of 1802, 1834 and the revised statutes of 1873 above cited.

In *Murdock vs. City of Memphis, syllabus 591, opinion, 636*—speaking of the conditions under which writs of error or appeals from the highest Court of a state to this Court, and of decisions reviewable by this Court, this Court, per Justice Miller, says:

"(5) If it finds that it is rightly decided, the judgment must be affirmed.

"(6) If it was erroneously decided against plaintiff in error, then this Court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that Court, not-

withstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matters or issue."

In Jenkins vs. U. S., 110 U. S., 222, it was held, following the last cited case, that when the record discloses two defenses to an action brought in a state Court, one presenting a Federal question and one presenting no Federal question, either of which if sustained was a complete defense to the suit, and that the State Court gave judgment in favor of the defendant on both, and the case is brought to this Court by writ of error, this Court will affirm the judgment below without considering the Federal question.

In Seneca Nation vs. Christy, 162 U. S., 283, it appeared that on the 31st day of August, 1826, the Seneca Nation by treaty and conveyance conveyed away the lands sued for in the action for a valuable consideration, the receipt of which was acknowledged, but the treaty was not ratified by the Senate or proclaimed by the President. On the 13th of October, 1885, an action was commenced in the Supreme Court of New York to recover a portion of the land so conveyed. It was brought under the provisions of the act of May 8, 1845, c. 150, of the laws of New York for that year, entitled, "An act for the protection and improvement of the Seneca Indians," etc. The trial Court gave judgment for defendant, which judgment was sustained by the Court of Appeals of the state on two grounds: (1) That the grant of August, 1826, was a valid transaction, not in contravention of the Constitution of the United States, or of the Indian Intercourse Act of 1802, and (2) that the right of recovery under the New York Act of 1845, was barred by the statute of limitations. Held, that as the judgment could be maintained upon the second ground, which involved no Federal question, this Court, under the well-established rule, must be held to be without jurisdiction, and the writ of error must be dismissed. Citing in support of this rule, Eustes vs. Balles, 160 U. S., 361; Billis vs. Stenchfield, 159 U. S., 658.

By referring to the Michigan cases cited in my main brief, pages 42-43, on the question of adverse possession, it appears among other things that title acquired by adverse possession constitutes a legal title, which is in harmony with the decisions of this Court, as shown by the decision in Bicknell vs. Comstock, 113 U. S., 153, where it is said: "This Court has more than once held that the lapse of time provided by the statutes makes a perfect title. In Leffingwell vs. Warren, 2 Black, 599, it is said that 'the lapse of time limited by such statutes not only bars the remedy to it, but extinguishes the right and vests a perfect title in the adverse holder.' And this doctrine is repeated in Croxall vs. Sherard, 5 Wall, 289, and in Dickerson vs. Colgrove, 100 U. S., 583."

Considering the questions as they appeared in the Michigan Circuit and Supreme Court (Record page 18), it appears that after testimony had been put in showing occupancy by adverse possesion, counsel for defendant in error contended that there was enough evidence to get before the Court the points made in reference to the treaty and patent, and that then was as good a time as any to have a ruling upon that question. Thereupon Mr. Van Kleeck, counsel for the plaintiff in error, said: "I think there is no dispute between counsel as to how this case stands; the title as I understand from the record is in the Indians; that is the only thing there is in the case. We are entitled, as I understand it, to a direction from the Court to the jury to find that title in us. The right to recover for improvements is another thing. The right to their title *by occupation for fifteen years* is another thing, and those I understand are the two questions Mr. Collins wants to bring up at this time.

"Mr. Collins—Not on the improvement question, but just on the effect of occupancy and title. There is no dispute, Your Honor will find, between counsel."

"Mr. Van Kleeck—Not a bit; it simmers down to a question of law."

Thereupon counsel for plaintiff in error stated his propositions in attack of the limitation clause in the patent, whereupon Mr. Webster, of counsel for plaintiff in error, said: "We think that the patent should be the starting point from which we should start this title, and that it is not dependent upon any treaty that was made by the United States."

The Circuit Court did not go fully into the reasons for its ruling, but instructed the jury to bring in a verdict for the defendant. On pages 16 and 17 of the present record, a deed from the Woonsocket Institute of Savings, dated July 14, 1881, conveying the land in question in this suit, was put in evidence, and Peter Francis, one of the defendants, on pages 17 and 18 of this record, said: "I am one of the defendants in this case; I know the land that is being sued for in this case; first knew it in 1881; my father bought it at that time. The Woonsocket Savings Institution *was in possession then.* My father owned it up to January 15, 1902. My father was in the sole and absolute control and sole and undisputed possession of the property described in the declaration from the date of the deed, from the Woonsocket Institute until January 15, 1902. John C. Francis was in possession as his tenant," * * * that three of them were in possession then, and that his father "paid the taxes on the property continuously during the time of his ownership from 1881 to 1902;" * * "on January 15, 1902, Gregory Francis deeded the land to the three defendants." And upon these points of testimony Mr. Van Kleeck has made the following statement in his brief. On page two, he says: "Defendants or their grantors have been in continuous possession of the land since the date of the Woonsocket deed, August 18, 1881." And in the addendum on page 38 of Mr. Crutchfield's brief he says: "The deed of the Woonsocket institution was made about twenty-one years before the commencement of the suit."

When the case reached the Supreme Court, there were two questions before the Court: (1) As to the effect of the limitation clause in the patent which was ruled against the

~~defendant~~ plaintiff. (2) The effect of the occupancy under the testimony in the case as shown by the record in the Circuit Court. Upon this point the Court ruled that defendant had title by occupancy. In this connection what the record shows as to the age of the plaintiff may be relevant. Mr. Van Kleeck, in his addendum, page 37, of Mr. Crutchfield's brief, complains of the statement in my brief that the plaintiff is an old woman, and he follows it up with a statement on his part that there is nothing to show this; in fact, she is not past middle-age. The record on this point shows, page 15 of this record, that plaintiff testified, *"I cannot tell how old I am. * * * I am getting to be quite an old woman."*

This condition of the record in this case in connection with the points in this division of the brief above stated, shows the irrelevancy of the claims made in the opposing briefs, that no title was traced from the government; that defendants and their prior grantees in chain of title were squatters, and that nothing was gained by adverse possession or prescription by the defendants and their father.

IV.

Claims in Mr. Crutchfield's brief not herein otherwise specifically referred to, will now be noticed. Inasmuch as the tract reserved had not been located in any other manner, the patent is essential to designate the land reserved, and the clause restricting alienation without the consent of the President was notice to the world of the government's understanding of the nature of the title granted, *and its acceptance by the reservee made this construction conclusive.* (Pages 12-13). And the Bo-kow-ton-den patent was a necessary constituent of the plaintiff's title. The text of the patent was also evidence of the intent of the contracting parties to the treaty. (Pages 28-30).

The claim that the patent was essential to designate the land and was a necessary constituent of plaintiff's title, is not correct. The treaty granted the title; the designation could

be made by survey; the government was required to do all things necessary to perfect the title; the patent assumes that a survey had been made; the patent was proper to evidence the survey, and so far as the designation of the land is concerned, the patent amounted to no more than conclusive evidence that the land in question was the land granted by the treaty.

The claim that the clause restricting alienation without the consent of the President was notice to the world of the government's understanding of the nature of the title granted, is not correct. The patent was proclaimed in 1820, the patent was made in 1827; and the limitation clause simply evidences the fact that the government officials who had charge of the matter of preparing the patents then thought that this provision should go into the patent. I most respectfully submit that the known history of the manner of preparing and issuing government patents shows that the fact of the issuance of the patents does not imply that the President or that the head of a department has passed judgment upon its issue or that a patent has been issued as a result of a consideration of the facts in the case or the law applicable thereto, but that the duty of preparing the patents has been performed by officers in the General Land Office, and that the practice as to the manner of the preparation of such patents and as to what they shall contain, has been varied.

The case of the United States vs. Saunders, 96 Federal Reporter, 268-271, opinion by Hanford, District Judge, illustrates mistakes which may be made in this respect. In that case the limitation placed in the patent was said to be, "No more relevant to the rights of the defendants or their grantors than a verse from the first chapter of Genesis."

It is claimed that by reason of the acceptance by the reservee of the patent containing the clause restricting alienation without the consent of the President, which showed that the government understood that the title was limited according to the clause restricting alienation, the reservee was conclusively bound. On page 34 of Mr. Crutchfield's brief, he says: "The

original reservee, Wa-bo-ga-do, child of Bo-kow-ton-den, was under a double disability, that incident to Indians generally and being an infant and a small child when he died. If the contention of defendants is sustained, the protection which the law, the treaty and the patent threw around this child and his heirs has been converted into a deceptive artifice."

In view of this last statement in Mr. Crutchfield's brief, what shall be said of the proposition that the acceptance by the reservee of the patent conclusively bound it as to the government's understanding of the nature of the title granted, to the effect that the clause restricting alienation without consent of the President was valid and was notice to the world of the government's understanding?

In Mr. Crutchfield's brief, (pages 34-35), the claim is made that it is my contention that the removal of plaintiff's parents along with part of their tribe constitutes an extinguishment of her title under the law, treaty and patent of the United States; and the claim is also made that were plaintiff's parents and plaintiff subjects of the Canadian and British governments, their property rights, as has been shown by my associates in this case, would not thereby be impaired.

This claim is made upon an entire misapprehension of the point made in my main brief, which was that the ancestors of the plaintiff by their conduct lost a personal privilege. This privilege was not a right in property or a right to property, but was a personal privilege which by their act under the circumstances they waived and abandoned.

For information in respect to the subsequent history of the treaty in question and of the Saginaw band of Chippewa Indians, attention is called to the following circumstances: By the treaty of January 14, 1837, proclaimed July 2, 1838, (7 Stat. 528), between the government and the Saginaw tribe of the Chippewa nation, by Article 1 of the treaty, the Chippewa nation ceded to the United States the land reserved to that nation by the Saginaw treaty of 1819, article 2.

In the treaty between the government and the Chippewa Indians of Saginaw, parties to the treaty of January 14, 1837, above, and other bands of Chippewa Indians, it was provided by article six that the *tribal organization* of Indians, except so far as necessary to carry into effect the treaty, *was dissolved*. This treaty was made August 2, 1855, and proclaimed August 21, 1856. (11 Stat. 633).

By the provisions of the act of February 8, 1887, (24 Stat. 1, 238, Sec. 6), it is provided among other things that every Indian born within the territorial limits of the United States to whom allotment shall have been made under the provisions of this act or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

It will thus be observed that the tribe to which Bo-kow-ton-den and the children of Bo-kow-ton-den belonged, was dissolved in 1855, and that if the line of heirs of Bo-kow-ton-den had remained residents of the United States, by virtue of the above citations they would have become citizens thereof.

The provisions quoted taken together show that it is the policy of the government of the United States to distinguish as to their rights between Indians born in the United States and those who have not been born therein, and are not residents or citizens thereof.

It is most respectfully submitted that the judgment of the Supreme Court of Michigan should be affirmed.

CHESTER L. COLLINS,
Attorney for Defendants in Error.